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EXAMINER

THAKUR, VIREN A

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte AARON STRAND, KARL L. LINCK, JUDY FISCHER,
THOMAS J. SPAETH, and JERRY D. KOLBE

Appeal 2009-013725
Application 09/804,403
Technology Center 1700

Before ADRIENE LEPIANE HANLON, CATHERINE Q. TIMM, and
JEFFREY T. SMITH, *Administrative Patent Judges*.

TIMM, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING¹

On September 21, 2010, Appellants filed a Request for Rehearing of the Decision of July 26, 2010. In that Decision, the panel affirmed the

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

Examiner's decision to reject claims 1, 2, 6-9, 14, 16, 18, 19, 75, 79, 82-86, 93, 104, 107-112, 122-128, and 130-147. Of particular relevance to the Appellants' Request, the panel sustained the Examiner's rejection of claims 1, 2, 6-9, 14, 18, 19, 75, 79, 82-86, 104, 107-112, 122-128, and 130, 132, 134-137, and 142-147 under 35 U.S.C. § 103(a) as unpatentable over Belmont in view of Stolmeier, Herrington, Buchmann, Morgan, Van Erden, and Kuge. Claim 1 is reproduced below for convenience.

1. A reclosable bag for filling with at least one food product, said reclosable bag comprising:

a single sheet of web material having first, second, third, and fourth edges wherein said first and second edges are respectively located opposite each other in said single sheet of web material and said third and fourth edges are respectively located opposite each other in said single sheet of web material, said single sheet of web material comprising a fold located therein intermediate said first and second edges of said single sheet of web material to define two opposite sides of said reclosable bag, said single sheet of web material also having two areas of structural weakness that are respectively located on opposite sides of said fold, said first and second edges of said single sheet of web material being located adjacent each other to define an opening therebetween which is distally located with respect to said fold; and

a reclosable fastener structure having first and second opposite ends and comprising two releasably engageable tracks each having a skirt structure of skirt web material extending therefrom, said reclosable fastener structure being located in said fold with said skirt structures respectively extending toward said first and second edges of said single sheet of web material;

said skirt structures each including a distal margin;

wherein said reclosable fastener structure has a notch located at a corner at each of said first and second ends, said notches defining where a corner portion of said reclosable fastener structure that includes an end portion of said releasably engageable tracks has been removed, and wherein the periphery of said notches has been sealed;

said distal margins of said skirt structures being respectively coupled to said web material on said opposite sides of said reclosable bag at opposed locations which are respectively located between said areas of structural weakness and said opening;

said releasably engageable tracks of said reclosable fastener structure extending past said areas of structural weakness and into said fold structure;

said two opposite sides of said reclosable bag being sealed at said first and second edges of said single sheet of web material to define sides of said reclosable bag, said reclosable bag being capable of being filled with at least one food product through said opening intermediate said first and second edges of said single sheet of web material, following which said first and second edges of said single sheet of web material are sealed together to enclose the at least one food product inside said reclosable bag.

In the Request, Appellants contend that:

I. The Board misstated the issue on appeal and, in doing so, treated the Examiner's position as presumptively correct and failed to objectively review the record as a whole and objectively assess the persuasiveness of Appellants' arguments. (Request 1-3.)

II. The Board does not address the lack of the required element namely a single sheet of web material in the combination of Belmont and Stolmeier, since "the 'improvement' suggested by the Examiner is the use of a separate second sheet of material (with perforations) that is added to the Belmont bag." (Request 5-7.)

III. The Board does not provide any reason or factual basis that one skilled in the art would modify the Belmont reference to create the present invention as claimed, an analysis required by the Supreme Court in *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007). (Request 5-6.)

We do not find Appellants' contentions persuasive.

Appellants contend that the issue on appeal is not "whether Appellant has established 'reversible error' on the part of the examiner," but rather, "the issue is whether the applied reference renders the subject matter of any of the claims on appeal as a whole obvious within the meaning of 35 U.S.C. § 103(a)" (Request 1).

As a first matter, the issue statements in the Decision contained no such "reversible error" language.² The first issue statement recited in the Decision reads as follows:

does the evidence support the Appellants' view that the Examiner erred in concluding that a bag made from a single folded sheet web material with integral areas of structural weakness located below a slider and adjacent the skirt of a fastener structure, as recited in claim 1, would have been obvious to one of ordinary skill in the art based on the teachings of Belmont and Stolmeier?

(Decision 5.)

We disagree that the Decision in any way treats the Examiner's position as presumptively correct. The Decision includes an analysis of the

² Appellants' Request also includes an extensive objection to the Board's alleged citation of *In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006), allegedly on page 4 of the Decision (Request 2-3). Yet, the Board's Decision does not reference the *Kahn* case anywhere in its decision.

Examiner's position and determines "the Examiner's reasoning to be sufficient to establish a prima facie case of obviousness" (Decision 5-6).

We also disagree that the Decision fails to objectively review the record as a whole or fails to objectively assess the persuasiveness of Appellants' arguments.

In formulating the issues for deciding the appeal, we reviewed the Examiner's Final Rejection, Appellants' contentions in the Brief, the Examiner's response in the Answer, and Appellants' reply in the Reply Brief. Appellants' contention is that a person of ordinary skill in the art would not have combined the teachings of Belmont and Stolmeier as the Examiner did, i.e., the Examiner's position is "unintuitive" (Dec. 5, Br. 23). Appellants' sole argument is, and continues to be, that the combined teachings would have only suggested to one of ordinary skill in the art that the Belmont bag be covered with a second hood having perforations therein as taught by Stolmeier, which is not the claimed invention (Br. 23; Reply Br. 3-5; Request 3-7). However, the Examiner never suggests that the teachings of the references would lead one of ordinary skill in the art to add a second hood to the Belmont bag. Accordingly, Appellants' assertion is an inaccurate reflection of the Examiner's position.

We implicitly rejected Appellants' arguments as an incorrect assessment of the Examiner's position, by stating clearly the Examiner's actual position (Decision 5-6). The Examiner's actual position is that one of ordinary skill in the art would have added the perforations, and only the perforations, as taught by Stolmeier, to the folded bag taught by Belmont, in the same position with respect to the zipper as taught by Stolmeier, in order to facilitate the removal of the folded covering and provide access to the

zipper taught by Belmont (*see* Decision 5-6; Ans. 7). It is this position, and this position only, that we considered for adequacy under 35 U.S.C. § 103(a) because that was the analysis put forth by the Examiner. Appellants have not convinced us that our choice of concentrating our discussion on the Examiner's actual findings of fact and reasoning resulted in error.

It is well-settled that “the [E]xaminer bears the initial burden, on review of the prior art or on any other ground, of presenting a *prima facie* case of unpatentability.” *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992); *see also In re Piasecki*, 745 F.2d 1468, 1472 (Fed. Cir. 1984). However, Appellants are reminded that “[t]he ‘*prima facie* case’ serves as a procedural mechanism that shifts the burden of going forward to the applicant, who must produce evidence and/or argument rebutting the [Examiner's] case of unpatentability.” *Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential) (internal citations omitted).

An appellant may attempt to overcome an examiner's obviousness rejection on appeal to the Board by submitting arguments and/or evidence to show that the examiner made an error in either (1) an underlying finding of fact upon which the final conclusion of obviousness was based, or (2) the reasoning used to reach the legal conclusion of obviousness. Similarly, the applicant may submit evidence of secondary considerations of non-obviousness.

Id. (internal citation omitted).

Appellants failed to identify any factual error on which the Examiner's conclusion of obviousness was based. The actual teachings of the references were not in dispute. Appellants' arguments also failed to identify anything in the Examiner's actual reasoning that was untenable. To the contrary, Appellants generally suggested that the Examiner's reasoning

was “unintuitive” and substituted an alternative reasoning that was not consistent with the Examiner’s position.

The Decision effectively addressed the facts of Belmont and Stolmeier and found that the Examiner had provided good reasons for concluding that one of ordinary skill in the art would have used the perforations taught by Stolmeier and added them to the folded bag of Belmont, in a location with respect to the zipper as taught by Stolmeier (Decision 6).

We also disagree with Appellants’ assertion that the Examiner’s Answer and/or the Board’s Decision lack an explicit analysis required by *KSR* (Request 5). The Decision acknowledges the express teaching in Stolmeier that the purpose of the perforations is to facilitate the removal of tamper resistant material (Decision 6). Thus, we agreed with the Examiner that this express teaching would have suggested to the ordinary artisan the use of similar perforations in the bag taught by Belmont, to remove the folded structure encasing the zipper (Decision 6). Specifically, the Examiner’s proposed modification was no more than the predictable use of perforations according to the functions established by Stolmeier (Decision 5-6). *See KSR*, 550 U.S. at 417.

Accordingly, Appellants’ arguments, when considered with the totality of the evidence, do not support a determination that the Examiner’s position is not supported by a preponderance of the evidence.

Appeal 2009-013725
Application 09/804,403

The subject Request has been granted to the extent that the Decision has been reconsidered, but is denied with respect to making any changes therein.

REHEARING DENIED

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